Supreme Court of the United States

OCTOBER TERM, 1933
No. 75

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH AND GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF WILLIAM B. BUTTERWORTH, DECEASED,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Now come Burton E. Eames and R. Gaynor Wellings, counsel for The New England Trust Company, et al., Executors, Estate of Stillman P. Williams, petitioners in a proceeding against the Commissioner of Internal Revenue, Docket No. 44570, now pending before the United States Board of Tax Appeals, and say that the issue or issues in said case are the same as presented for determination by the case now before this Court and move for leave to file this brief as amici curiae in the case now at Bar.

Respectfully submitted,

BURTON E. EAMES,
R. GAYNOR WELLINGS,
Attorneys for The New England
Trust Company, et al., Executors.

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Respondents.

BRIEF OF AMICI CURIAE

OPINIONS BELOW.

Julia Butterworth, Henry W. Butterworth and Girard Trust Company, Trustees Under the Will of William B. Butterworth, deceased, v. *Commissioner of Internal Revenue,* 23 B. T. A. 838.

Butterworth, et al. v. *Commissioner of Internal Revenue, United States Circuit Court of Appeals for the Third Circuit,* 63 F. (2d) 944.

JURISDICTION.

This case is before this Court upon a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Third Circuit filed March 3, 1933 (R. 27), which decision reversed the judgment of the

United States Board of Tax Appeals entered June 29, 1931 (R. 17) which determined deficiencies in the respondents' income taxes for the years 1924 and 1925 in the respective amounts of $319.54 and $968.60 (R. 17). A petition was duly presented to this Court by the petitioner herein for a writ of certiorari, and order allowing the same was filed herein on May 29, 1933 (R. 27). The application for certiorari was made within three months after the filing of the judgment in the Circuit Court of Appeals as provided by Section 350 of the Judicial Code.

STATEMENT OF THE CASE.

The respondents are Executors and Trustees of the Estate of William B. Butterworth who died testate on October 5, 1921, while a resident of Pennsylvania (R. 9). By his will, dated March 18, 1910, the testator devised and bequeathed to certain trustees the rest and residue of his property in trust to invest the same and to pay the net income arising therefrom to his wife, Julia Butterworth, for the term of her natural life (R. 9). The will also made provision for the disposition of the corpus of this trust fund following the death of the deceased's widow (R. 9). In accordance with the statutes of Pennsylvania, the testator's widow duly elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania (R. 9). During 1924 and 1925 the Trustees made payments to the widow as provided for under the will, which amounts added to the payments of prior years did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutes had she not elected to take under the will (R. 9, 10). In filing returns for the years 1924 and 1925, the respondents as Trustees deducted from gross in-

come, for the purpose of ascertaining the taxable net income, the amounts distributed to the widow under the testamentary trust (R. 10). Thereafter the petitioner determined deficiencies in respondent's income tax for the years 1924 and 1925 (R. 9). These deficiencies resulted from the disallowance of the amounts paid the decedent's widow and which had been deducted by the respondents from gross income (R. 9). Thereafter the respondents duly filed their petition with the United States Board of Tax Appeals for a redetermination of said deficiencies (R. 2). After hearing, the United States Board of Tax Appeals, on June 23, 1931, decided that under Section 219 of the Revenue Act of 1924 the respondents were not entitled to deduct from gross income the amounts distributed to the decedent's widow and on June 29, 1931, the Board ordered and decided that there are deficiencies in the respondents' income tax for the calendar years 1924 and 1925 (R. 17). 23 B. T. A. 838. Thereafter, on December 21, 1931, the respondents duly filed a petition for review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Third Circuit, (R. 17), which Court on March 3, 1933 entered a judgment reversing the decision of the United States Board of Tax Appeals (R. 27). 63 F. (2d) 944.

The parties are now before this Court upon a writ of certiorari which was granted by this Court on May 29, 1933 (R. 27).

SPECIFICATION OF ERRORS.

It is intended to urge in this case the following assigned errors:

(1) The United States Board of Tax Appeals erred in refusing to permit the respondents in computing the

net income of the trust, to deduct those amounts which they distributed to the decedent's widow in the calendar years 1924 and 1925.

(2) The United States Board of Tax Appeals erred in holding that the payments made by the respondents to the decedent's widow during the calendar years 1924 and 1925 were not payments of income.

(3) The United States Board of Tax Appeals erred in holding that the decedent's widow, to whom was given the income from the residuary estate of the decedent for her life, is not "a beneficiary" of his estate.

(4) The United States Board of Tax Appeals erred in rendering a decision for the petitioner.

STATUTES INVOLVED.

The following are the applicable provisions of the Revenue Act of 1924:

"SEC. 219 (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

* * *

(b) Except as otherwise provided in sub-divisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall

be computed in the same manner and on the same basis as provided in section 212, except that—

* * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

(3) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

Summary of Argument.

I. Section 219 (b) (2) of the Revenue Act of 1924 should be construed so as to permit the respondents in computing the net income of the trust to deduct those amounts which they distributed to the widow in the years 1924 and 1925.

II. The object of Section 213 (b) (2) of the Revenue Act of 1924 is defeated by the construction placed upon

Section 219 (b) (2) of that Act by the United States Board of Tax Appeals.

INTRODUCTORY STATEMENT.

When a widow accepts the provisions of her deceased husband's will and is paid the entire net income from his estate currently in lieu of her right of dower or her statutory share of the corpus of the estate, it has been held that such current payments are not taxable income to her before or until the aggregate amount of such payments equals and exceeds the value of the property she relinquished by accepting the provisions of the will. The reason given by the courts for this decision is that the payments to the widow are, in her hands, returns of capital, not income, and represent "purchase money" or "instalment payments" to the widow by the estate in consideration of her statutory or dower interest in the corpus of the estate.

Warner v. *Walsh*, 15 Fed. (2d) 367; (C. C. A. Second Circuit);

United States v. *Bolster*, 26 Fed. (2d) 760; (C. C. A. First Circuit);

Allen v. *Brandeis*, 29 Fed. (2d) 363; (C. C. A. Eighth Circuit).

On the other hand, the Income Tax Unit has ruled that income from property held by an estate or trust to be paid to a widow in lieu of her dower rights or statutory interest may not be deducted by the estate or trust until these income payments equal the value of her interest; and further, that *after* that time such payments should be deducted as ordinary income distributions in computing the net income of the estate or trust.

I. T. 2506, C. B. VIII-2, p. 129; *I. T. 2480*, C. B. VIII-2, p. 141.

The basis of these rulings seems to be the opinion that only those distributions of income by an estate or trust which under the taxing statutes "shall be included in computing the net income of the beneficiaries" are allowable as deductions in computing the net income of the estate or trust (*I. T. 2506*, C. B. VIII-2, p. 129, 130; *I. T. 2480*, C. B. VIII-2, p. 141, 144) and that such distributions do not include payments made to a widow prior to the time they equal the share of her dower or statutory interest in her deceased husband's estate.

The Board of Tax Appeals in the case at Bar has upheld the first of these rulings on the ground that the amounts paid to the widow were not distributions of income and that the widow is not a "beneficiary" within the meaning of Section 219 (b) (2) of the Revenue Act of 1924. 23 B. T. A. 838.

ARGUMENT.

I. Section 219 (b) (2) of the Revenue Act of 1924 should be construed so as to permit the respondents in computing the net income of the trust to deduct those amounts which they distributed to the widow in the years 1924 and 1925.

The language of Section 219 (b) (2) expressly allows such deduction to be made and is clearly opposed to the decision of the Board of Tax Appeals:

Section 219 (b) (2) provides:

> "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, . . . but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not . . . ."

From the plain language of this statute it must be apparent that we are not concerned in the immediate case with the nature of the payments once they have been made to the widow. Our question is preliminary to and distinct from any such question and has to do only with the taxability of the money received by the fiduciary as income from the securities held in the trust fund. The decision of that question should not, therefore, be influenced by what the courts have concluded to be the rights of the widow or by the fact that, unless the income of the trust in question is taxed to the fiduciary, it will escape taxation. It is a fundamental principle in the construction of statutes levying taxes that the literal meaning of the words employed is most important, for such

statutes are not to be extended by implication beyond the clear import of the language used.

United States v. *Merriam*, 263 U. S. 179, 187, 188.

Applying this principle to the language of Section 219 (b) (2), it cannot be held that the nature of the payments to the widow has any bearing on the taxability of such income. That it was evidently and obviously the intention of Congress that considerations which determine the taxation of beneficiaries were not to enter into the taxability of fiduciaries is manifested by the language used in that clause of Section 219 (b) (2) which provides "but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries". These words are addressed not to the fiduciaries but to the beneficiaries. They contain a direction to the distributees of the trust funds to include such payments in the computation of their tax. No direction whatsoever is made to the fiduciary by the language of this clause and as it must be remembered that the beneficiary and fiduciary are separate and distinct persons having separate and distinct responsibilities for the purposes of taxation, it seems clear that no direction was intended by Congress except in so far as the words *"but the amount so allowed as a deduction"* repeat the legislative intent to exempt a fiduciary from taxation whenever the income from the trust funds, which otherwise would be taxable to the Trustee, is currently distributed to the beneficiaries of the trust.

Furthermore, it should be noted that Congress did not express its intention in the above clause in terms of a proviso. The words used are *"but"* the amount so allowed . . . *"shall be"* included in computing the net income of the beneficiary and not *if* or *provided* or *on con-*

dition that such amount *is* so included. The language of the statute clearly provides it is enough that it is "income of the estate or trust" and is "distributed currently by the fiduciary to the beneficiaries". To give the language used the same meaning as would be given to other language not used is, it is submitted, not adhering to the rule of construction which governs the interpretation of statutes levying taxes. The word *"but"* does not in any way qualify the meaning of the language preceding it as would a word such as *provided*. Furthermore the words *"shall be"* are mandatory in import and, because the fiduciary is in no measure responsible for the return or tax of the beneficiary, must have been used by Congress for the purpose of imposing an obligation upon the beneficiary alone apart from the fiduciary.

Standing alone the meaning of the language of Section 219 (b) (2) can permit of no doubt. By it the estate or trust is clearly entitled to a deduction for the amount of the income from a trust fund paid to any beneficiary whoever the beneficiary may be and without regard to the taxable status of the beneficiary with respect to the income so paid. The case where it is paid to a widow in lieu of her dower or statutory rights is no exception so far as the language goes. The opinion of the United States Board of Tax Appeals, however, intimates that the payments made by the Trustees in this case were not of "income" and further states that said payments were not made to a "beneficiary" within the meaning of the Revenue Act of 1924. The Board in its opinion, (R. 15), says:

> "Section 219 of the Revenue Act of 1924, quoted above, deals with income. It taxes trust income primarily to the Trustees but it allows the Trustee to deduct the 'income . . . which is to be distributed cur-

rently by the fiduciary to the beneficiaries'. This provision in our opinion relates solely to amounts paid as income to the objects of the testator's bounty. It does not apply to other payments by the Trustee, as in this case where the Trustee was completing the offer made to the widow for the purchase of her share in the estate; the Trustee in such case was merely carrying out the 'convention or contract' (*Isenhart* v. *Brown, supra*) between the testator and his widow. The widow in such a case is in no sense a beneficiary, but, as held by the authorities above quoted, she is a 'purchaser for value'. The statute taxes to a beneficiary only 'income paid as such' (*Burnet* v. *Whitehouse,* 282 U. S.) and in our opinion contemplates the deduction by the Trustee only of income paid as such to a pure beneficiary as, for example, in the *Gavit* and *Beatty* cases, *supra.*"

It does not seem to be open to question that the payments to the widow were made out of "income" from the trust fund. The Circuit Court of Appeals in both *Warner* v. *Walsh* and *United States* v. *Bolster,* supra, in deciding that such payments were not taxable to the widow nevertheless recognized the fact that they were payments out of "income". At page 368 the Court in its opinion in the *Warner* case says that the obligation of the fiduciary to the widow "is secured by the *income** . . . of the trust fund." And again in the *Bolster* case the Court, at page 763, says:

> "In the instant case the ground of the exemption is, not that the *income** received is a bequest, but that such *income** is exempt, because it represents 'purchase money' or a return of capital."

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*Italics ours.

In order to be taxable to the Trustees, the moneys received by them and from which the payments to the widow were made must have been "income" because by Section 219 (a) it is only "income . . . of any kind of property held in trust" that is taxable. Accordingly, if the payments to the widow were not made out of "income" of property held in trust, the taxing statute would have no application. That these payments were made out of "income" is also evident from sub-division (b) of Section 219 which provides that "the tax shall be computed upon the net income of the estate or trust, . . ." So that to be within this sub-division the payments must have constituted "income" to the fiduciary.

By its ruling (*I. T. 2506*, C. B. VIII-2, p. 129, 130) that, as soon as the payments to the widow equal the value of her dower right or statutory share of her deceased husband's estate, they become *ordinary* income and as such subject to tax, the Government recognizes this money to be income in the hands of the fiduciary. In the first place the ruling describes the income which is to be subject to tax to the widow as *ordinary* income. By this the Government must mean income which is taxable as distinguished from income which is not taxable. There is no basis in the statute for any such distinction. Whether it is taxable or not, however, it is nevertheless admitted to be income. Again, it is inconsistent to say that when received by the fiduciary it is income, but when paid to the beneficiary it is not. The character of these payments must first be determined either as income or not and then the statute applied to them. They have been found to be income and the Government cannot change their character from income to capital merely so that they shall not escape taxation.

Assume that a testator by his will established a trust fund for his widow in lieu of her dower or statutory rights and that before this fund was handed over by the executor to the trustee and during the period of administration or settlement of the estate the executor distributes to the widow the income received from the trust fund, would not the estate be entitled to a deduction of the income so distributed by Section 219 (b) (3) of the Revenue Act of 1924? Under the authority of *Riker* v. *Commissioner of Internal Revenue*, 42 Fed. (2d) 150, it would seem that such a deduction should be allowed. In that case the estate of the deceased was still unsettled and in the process of administration during the year 1923. For that year it filed an income return in which it included $33,000 of its income which had in fact been paid by the estate during that year to the residuary legatee. The Commissioner of Internal Revenue reduced the taxable income of the estate by that amount and created the deficiency involved by adding that sum to the taxable income of the residuary legatee.

The pertinent provisions of the Revenue Act of 1921 which controlled were as follows:

"Sec. 219 (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(c) In cases under paragraphs (1), * * * the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or

settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. * * *

(d) * * * in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, * * *"

The Court held that under Section 219 of the Revenue Act of 1921 the action of the Commissioner was proper and that the tax was properly assessed to the residuary legatee. In its opinion, at pages 150 and 151, the Court says:

"No one does, or could, consider the $33,000. as anything but income to the estate.

* * *

"Since the sum in controversy was properly paid by the estate to the ultimate beneficiary, though the testatrix had not expressly provided for the payment of income to him, it might have been deducted from the taxable income of the estate in accordance with subdivision (c) above. * * * We agree that the statute gave the estate permission only to make the deduction, and, if the words of the statute did not themselves amply show this to be so, would have an added reason for this conclusion in the fact that in 1924 Congress changed the law to make such a deduction compulsory. Revenue Act of 1924, section 219 (b) (3), 26 U. S. C. A., section 960 note."

The Court thus decides that the $33,000 received by the fiduciary was "income" to the estate without regard to what disposition was to be made of it by the estate and even though the will made no provision for the distribution of "income" to the residuary legatees. Furthermore, the Court points out that, although the Revenue Act of 1921 merely permitted the estate to make a deduction for the amount of income distributed, the Revenue Act of 1924 makes such a deduction compulsory. The Board of Tax Appeals had decided the above case in the same manner. *Hendricks* v. *Commissioner of Internal Revenue*, 16 B. T. A. 193.

Following this case, it would seem that in the case at Bar it should be ruled that the fund distributed was "income" in the hands of the fiduciary.

Accordingly, it is submitted that the payments to the widow were made out "of the income of the . . . trust" within the meaning of Section 219 (b) (2) of the Revenue Act of 1924. Therefore the respondents are entitled to a deduction of the amount of said payments *unless* they were *not* made "currently by the fiduciary to the beneficiaries" within the meaning of said Section 219 (b) (2).

Because, in the many decisions cited by the Board, a widow who elects to take under the will of her deceased husband and thus waives her dower or statutory interest in his estate has been held to be a "purchaser for value" to the extent of the value of the interest she has relinquished, the Board reaches the conclusion that a "widow in such a case is in no sense a beneficiary", or, at least, is not a "pure beneficiary" and, hence, the respondents are not entitled to deduct the payments made to her as "income of the . . . trust . . . distributed currently by the fiduciary to the beneficiaries" within the meaning of Section 219 (b) (2) of the Revenue Act of 1924 (R. 15).

It is earnestly submitted that such a construction of the word "beneficiary" in that section was never intended by Congress and is not justified by the authorities. It is a long and well established rule of construction that the language of statutes should be given its plain, ordinary and popular meaning, rather than a narrow, technical or strained definition.

Old Colony R. R. v. *Commissioner*, 284 U. S. 552, 560;

Woolford Realty Co. Inc. v. *Rose*, 286 U. S. 319, 327 and cases cited therein.

Neither the Board of Tax Appeals nor the petitioner denies the existence of a trust in this case. All the requisites of such a relationship being present, obviously, no such contention could be made. This being so, the testator's widow, who, under the terms of his will, is to receive the net income from the trust fund established thereby, must, in the ordinary, popular and natural sense of the word, be a "beneficiary". It is true that such a status may be attained in different ways,—that is, either through purchase by the beneficiary or through the gratuity of the settlor, but the fact remains that the cestui que trust in either case is a "beneficiary", as that word is commonly understood. To purchase a beneficial interest in a trust is not unusual. Many cases of such trusts have been before the Courts. For example, in those cases where "Massachusetts Trusts", so-called, which are organizations created by trust agreements, whereby property is conveyed to and managed by trustees and the income is distributed to the cestuis, whose interests in the trust are represented by transferable certificates, have been before the Supreme Court of the United States, the holders of the certificates are termed

"beneficiaries". It is well known that such certificates are most often acquired by purchase, but, nevertheless, in *Crocker* v. *Malley*, 249 U. S. 223, in which it was held that such an organization could not be regarded as a joint stock association within the meaning of the Income Tax Law of October 3, 1913, the Court in its opinion, at page 234, speaking through Mr. Justice Holmes, says:

> "We perceive no ground for grouping the two—*beneficiaries** and trustees—together, in order to turn them into an association, . . ."

In *Hecht* v. *Malley*, 265 U. S. 144, in which certain "Massachusetts Trusts" were held to be associations within the meaning of the Revenue Act of 1918, the Court again refers to the certificate holders as "beneficiaries". On page 159 of its opinion, the Court says:

> "The *beneficiaries** had no control except in certain matters in which their consent was required."

Again, at pp. 160 and 161, the Court, commenting upon the opinion in *Crocker* v. *Malley*, supra, says:

> "And the language used *arguendo* in reaching this conclusion that the trustees could not be deemed an association unless all trustees with discretionary powers are such, and that there was no ground for grouping together the *beneficiaries** and trustees in order to turn them into an association—is to be read in the light of the trust agreement there involved, under which the trustees were, in substance, merely holding property for the collection of the income and its distribution among the *beneficiaries**, and were not engaged, either by themselves or in connection with the *beneficiaries**, in the carrying on of any business."

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*Italics ours.

These cases, it is submitted, show that wherever a trust exists, even though the interest of those who receive the income is usually acquired by purchase, the cestuis are commonly referred to as "beneficiaries". Simply because a widow is a "purchaser for value" of the income from a trust fund, does not, therefore, negative her status as a "beneficiary".

To further illustrate, suppose the beneficiary of a trust fund were to sell and transfer his right to receive the income therefrom to another, would not the purchaser thereby become the "beneficiary"? Certainly, the trustee, upon notice of the transfer, would be obliged to pay the income to the purchaser, but nevertheless it would seem that such payments could be deducted by the trustee from the gross income of the trust under Section 219 (b) (2). The mere fact, therefore, that the new beneficiary would be a "purchaser for value" would have no bearing upon the deductibility of the payments made to him by the fiduciary.

In aid of subdivisions (g) and (h) of Section 219 of the Revenue Act of 1924, Regulations 65, Article 347, prescribed and published by the Commissioner of Internal Revenue by virtue of the authority conferred upon him by that Act, define the meaning of the word "beneficiary" as follows:

> "The term 'beneficiary', as used in this Article, includes any person entitled to an interest in the income or the principal of a trust, but does not include one having a merely nominal interest in the income or principal."

This definition also appears in Regulations 69, Article 347, Revenue Act of 1926, and Regulations 74, Article 881, Revenue Act of 1928. Although the Commissioner has restricted the definition of the word "beneficiary",

as used in the particular Article of the Regulations in which it appears, nevertheless it is significant that it is given no such limited or restricted meaning as that which appears in the opinion of the Board of Tax Appeals.

In *United States* v. *Bolster*, 26 Fed. (2d) 760, one of the decisions upon which the Board of Tax Appeals bases its opinion that the widow in the case at Bar is a "purchaser for value", the Court recognises the fact that the widow is also a "beneficiary". The first words of the Court's opinion are, "Sarah A. Davenport, of Boston, was the *beneficiary* under the will of her husband . . ." and in conclusion the Court, at page 763, states:

> "While in the Warner case the Court had before it an annuity, the provision relating to the annuity was made expressly in lieu of statutory rights of the *beneficiary** in the estate; . . ."

Furthermore, the Supreme Judicial Court of Massachusetts, in *Gruver* v. *Wood*, 174 Mass. 540, has decided that a widow, who accepts a legacy under the will of her deceased husband in lieu of dower, is a "beneficiary" in the natural and ordinary sense which, as pointed out above, the Supreme Court of the United States has said is the sense to be given the language of all statutes. In that case, after bequeathing a specific legacy to his widow expressly in lieu of dower in accordance with an antenuptial agreement, the testator left the residue of his estate "to the several beneficiaries" under his will with certain named exceptions of which the widow was not one. The question was whether under these circumstances the widow was a "beneficiary" within the meaning of the residuary clause. The Court held that she was, and, in its opinion at page 541, says:

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*Italics ours.

"The only question is whether the widow is a 'beneficiary under this will' within the meaning of the residuary clause. We think she is. It is true the legacy to her in the second item is given apparently in pursuance of the ante-nuptial contract and in lieu of dower and of any other right she as widow might have in the personal estate of the testator, and that therefore in case of a deficiency of assets she would not be regarded as a 'mere' or 'pure beneficiary', but would be entitled to a preference. *Pollard* v. *Pollard*, 1 Allen, 490. *Towle* v. *Swasey*, 106 Mass. 100. Yet she receives something under the will, and in the natural and ordinary sense is a beneficiary, and we think the term was used by the testator in this sense."

It is both interesting and important to note that *Gruver* v. *Wood*, supra, was decided in Massachusetts in November, 1899, nearly 40 years after the decision by the same Court in the case of *Pollard* v. *Pollard*, 1 Allen 490, which it cites and which holds that a widow to whom a legacy is given in lieu of dower is a "purchaser for value". Furthermore, *Pollard* v. *Pollard* is relied upon and quoted from by the Circuit Court of Appeals in *United States* v. *Bolster*, supra, and that part of the opinion in the *Bolster* case which contains the quotation is set forth in the opinion of the Board of Tax Appeals in the case at Bar (R. 11, 12). Since the Board of Tax Appeals relies upon *United States* v. *Bolster*, supra, which was decided upon the authority of *Pollard* v. *Pollard*, supra, it would seem that, although the Board recognizes the authority of *Pollard* v. *Pollard*, it refuses to follow the decision of the same Court in *Gruver* v. *Wood*, supra. It is submitted, therefore, that the Board of Tax Appeals is in error and, as held in Massachusetts, a widow is a "beneficiary" even though she has paid for whatever beneficial interest

she is entitled to and is therefore also a "purchaser for value".

It being well established, therefore, that the language of a statute is to be given its plain, ordinary and natural meaning, it seems, both on principle and authority, that a widow, who has elected to receive for life the net income of a trust fund established in her favor by the will of her deceased husband, is a "beneficiary" even though, in accepting the provisions of said will, she waived her dower or statutory interest in his estate, and, hence, it is submitted that payments made to her by a trustee under such circumstances are payments to a "beneficiary" within the meaning of Section 219 (b) (2) of the Revenue Act of 1924. This position is further fortified by that rule of construction universally recognized which requires that, in case of doubt, the provisions of taxing statutes must be construed most strongly against the Government and resolved in favor of the taxpayer.

United States v. *Merriam*, 263 U. S. 179, 187;
Gould v. *Gould*, 245 U. S. 151, 153.

II. The object of Section 213 (b) (2) of the Revenue Act of 1924 is defeated by the construction placed upon Section 219 (b) (2) of that Act by the United States Board of Tax Appeals.

The Circuit Courts of Appeal in *Warner* v. *Walsh*, 15 Fed. (2d) 367, *United States* v. *Bolster*, 26 Fed. (2d) 760, and *Allen* v. *Brandeis*, 29 Fed. (2d) 363, cited above, have determined that the payments made to a widow in lieu of her right of dower, or her statutory share of the corpus of her deceased husband's estate, are not taxable income to such widow. These decisions rest upon the theory that, in receiving such payments, a widow in legal

effect is the purchaser of an annuity and, under Section 4 of the Revenue Act of 1916 and Section 213 (b) (2) of the Revenue Acts of 1918, 1921 and 1924, income of this kind is exempt from taxation until the widow has recovered the value of her interest in the decedent's estate which she has relinquished. These sections are substantially the same and provide:

> "The following income shall be exempt from the provisions of this title:
>
> . . . . the amount received by the insured, as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon the surrender of the contract; . . ." *Revenue Act of* 1916, *Section* 4.
>
> "That for the purposes of this title . . .
>
> (b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title:
>
> . . . . . .
>
> (2) The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term, or at the maturity of the term mentioned in the contract, or upon surrender of the contract; . . ." *Revenue Acts of* 1918, 1921 *and* 1924, *Section* 213 (*b*) (2).

It being true, therefore, that a widow is not taxable on income received under these circumstances, it must be accepted that Congress did not intend the statute to apply to payments of this kind when received by the widow. Accordingly, if the fiduciary who makes these payments must pay a tax on the amount thereof, the widow's in-

come will be correspondingly reduced in amount, and the intention of Congress thereby thwarted. It is also true that in certain cases an additional hardship would be visited upon the widow. If, for example, the only income received by the widow was that distributed to her by the fiduciary in an amount insufficient to require the payment of a surtax thereon, but, on the other hand, the net income received by the fiduciary, when added to the taxable profit accruing to him from the sale of the trust securities, totaled an amount upon which a surtax must be paid by *him*, it is apparent that the income which would otherwise be payable to the widow must contribute to the extra burden of the surtax and consequently would be decreased by an amount even greater than if the tax were charged to and paid by the widow herself. Clearly, the trustee could not charge the tax against the principal of the trust for that would result in shifting the burden to the remaindermen, who have nothing to do with this controversy. The tax, if any is paid on this income by the trustee, must be charged against *income*. It is respectfully submitted that such a result would deprive the widow of the benefit of the decisions of the Circuit Courts of Appeal. The Board of Tax Appeals, in reply to this argument, says:

> "It is also argued that, if the respondent's position is sustained, the widow gets no real benefit from the decisions holding non-taxable the payments made in lieu of dower. It is not the purpose of courts to construe taxing laws so as to confer benefits other than those prescribed by the statutes. If it so happens that certain persons are benefited by one provision of the law, it does not follow that they must receive equal benefits under others. As pointed out above, the courts have not singled out widows and given them an exempt status, but have only in such cases as this, placed them

in the same class as other purchasers of annuities." (R. 16)

It is not being sought in this case to persuade the Court "to construe taxing laws so as to confer benefits other than those prescribed by the statute". The respondents, however, are seeking to enjoy the benefit of the taxing laws when such benefits are expressly prescribed by them. The Circuit Courts of Appeal, above referred to, have treated widows in circumstances like those present in the case at Bar, like purchasers of annuities and, as such, under the provisions of the Revenue Acts of 1916, 1918, 1921 and 1924 above cited, are exempt from taxation. It should be remembered that the Circuit Courts of Appeal, in the Warner, Bolster and Brandeis cases, were not confronted with the question now being considered, and, for the purpose of those decisions, it was sufficient to arrive at the conclusion that the widow was in legal effect the purchaser of an annuity. If, however, the facts of the case now before the Court are examined, it will be seen that, under the provisions of the testator's will, his widow is entitled to receive the entire net income from the rest and residue of his property for the term of her natural life. This situation, it is submitted, is not parallel to that of the ordinary annuity contract, in accordance with the terms of which, the annuitant is entitled to receive a stated annual amount which may be paid from any source chosen by the obligor and not the entire income from a specific and particular fund, as in the case at Bar. In the first case, that of the ordinary annuity contract, all income received by the obligor is taxable because it is in no way related to the payments which are made to the annuitant, the obligor being free to use such income as he sees fit, his sole obligation being to pay a stated amount of money annually to the annuitant.

In the case at Bar, however, the trustees are not at liberty to use the income from the trust fund as they see fit, because the terms of the testator's will confer the beneficial ownership of such funds upon his widow and it is the obligation of the trustees to turn over to the widow all income received from the investment of the fund. Under these circumstances, it is submitted that the income in the case at Bar should not be taxed to the trustees because in reality it belongs to the widow who is exempt from taxation.

On the other hand, if the widow in the case at Bar is, as the Board of Tax Appeals states, to be placed in the same class as other purchasers of annuities, it is respectfully submitted that she should be treated the same as other purchasers of annuities, who, if their contract calls for the receipt of a definite amount of money per annum, are entitled to enjoy the benefit of their contracts without the payment of any tax. To hold in the case at Bar that the widow is in legal effect the purchaser of an annuity but that her income from the trust fund is subject to the payment of a tax, whereas the payments received by other annuitants are not taxable, is both inconsistent and unfair. Although the Board of Tax Appeals in its opinion (R. 16) states that the case of *Lederer* v. *Stockton*, 260 U. S. 3, has no application in the case at Bar for the reason that the taxing statute does not purport to put widows in an exempt class and because there is no provision for them which could be construed as evidencing in their behalf any "beneficent purpose of Congress", it is submitted that that case has a strong bearing upon the construction which should be given the Revenue Act in question. Section 213 (b) (2) does, it is contended, place widows in an exempt class in so far as they are receiving income from a trust fund in lieu of their dower or statutory interest in an estate, at least until they have

received the value of the interest they have surrendered, and, accordingly, that Section does evidence a "beneficent purpose of Congress" which would be defeated by the construction placed upon the Revenue Act by the Board of Tax Appeals.

It should also be remembered that the fiduciary in the case at Bar is a mere conduit through which the widow receives her payments. Congress, it seems, must have had this fact in mind when it established Section 219 (b) (2) and (3) of the Revenue Act of 1924, allowing a deduction to be made by the fiduciary for the amount of income currently distributed to the beneficiaries. In fact, the Board of Tax Appeals has recognized this fact in *Jacob Brown, Trustee, et al.* v. *Commissioner of Internal Revenue*, 9 B. T. A. 521. In that case the entire income from property held in trust under a will was distributed by the trustee in 1920 to the beneficiaries of the trust pursuant to the direction of the testator; and it was held that the trustee was not liable to income tax in respect of the income distributed, but that the beneficiaries who received such income were liable to income tax on the amounts received by them. In its opinion, at page 525, the Board says:

> "The trustee was merely the conduit through which they received their income. The conduit should not be charged with income tax in respect of the income paid over to beneficiaries during the taxable year."

No other case has been heard of in which the Government has contended that, because the income could not be taxed to the beneficiary, it is taxable to the trustee. This contention is made only in the case of widows to whom the courts have shown a praiseworthy leniency because the income received by them was in reality in substitution for their legal rights in the estate. If they are exempt under

these decisions, it is their deserved good fortune, but this constitutes no reason for shifting the tax to the trustee, and thus taxing them indirectly and destroying the exemption. There is no principle of the income tax law, or any other law, which requires that all income, if not taxed at one place, must be taxed at another.

CONCLUSION.

For the reasons above set forth, namely, that the Revenue Act of 1924 expressly entitles the respondents in the case at Bar to the deduction they are seeking and is opposed to the imposition of a tax upon them because it would frustrate the purpose of the statute, the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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